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Chapter 28
Recommendations

It is the conclusion of these Committees that the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance. This is an important lesson to be learned from these investigations because it points to the fundamental soundness of our constitutional processes.

Thus, the principal recommendations emerging from the investigation are not for new laws but for a renewal of the commitment to constitutional government and sound processes of decisionmaking.

The President must "take care" that the laws be faithfully executed. This is both a moral and legal responsibility.

Government officials must observe the law, even when they disagree with it.

Decisionmaking processes in foreign policy matters, including covert action, must provide for careful consideration of all options and their consequences. Opposing views must be weighed, not ignored. Unsound processes, in which participants cannot even agree on what was decided (as in the case of the initial Iranian arms sale) produce unsound decisions.

Congress' role in foreign policy must be recognized, not dismissed, if the benefit of its counsel is to be realized and if public support is to be secured and maintained.

The Administration must not lie to Congress about what it is doing. Congress is the partner, not the adversary of the executive branch, in the formulation of policy.

Excessive secrecy in the making of important policy decisions is profoundly antidemocratic and rarely promotes sound policy decisions.

These recommendations are not remarkable. They embody the principles on which this country's success has been based for 200 years. What is remarkable is that they were violated so freely and so repeatedly in the Iran-Contra Affair.

Congress cannot legislate good judgment, honesty, or fidelity to law. But there are some changes in law, particularly relating to oversight of covert operations, that would make our processes function better in the future. They are set forth below:

1. Findings: Timely Notice

The Committees recommend that Section 501 of the National Security Act be amended to require that Congress be notified prior to the commencement of a covert action except in certain rare instances and in no event later than 48 hours after a Finding is approved. This recommendation is designed to assure timely notification to Congress of covert operations.

Congress was never notified of the Iranian arms sales, in spite of the existence of a statute requiring prior notice to Congress of all covert actions, or, in rare situations, notice "in a timely fashion." The Administration has reasoned that the risks of leaks justified delaying notice to Congress until after the covert action was over, and claims that notice after the action is over constitutes notice "in a timely fashion." This reasoning defeats the purpose of the law.

2. Written Findings

The Committees recommend legislation requiring that all covert action Findings be in writing and personally signed by the President. Similarly, the Committees recommend legislation that requires that the Finding be signed prior to the commencement of the covert action, unless the press of time prevents it, in which case it must be signed within 48 hours of approval by the President.

The legislation should prohibit retroactive Findings. The legal concept of ratification, which commonly arises in commercial law, is inconsistent with the rationale of Findings, which is to require Presidential approval before any covert action is initiated.

The existing law does not require explicitly that a Presidential Finding approving a covert operation be in writing, although executive orders signed by both Presidents Carter and Reagan required that they be in writing. Despite this requirement, a PROF note by McFarlane suggested that the initial arms sales to Iran were approved by a "mental finding," and there is conflicting testimony about whether certain actions were orally approved by the President. The requirement of a written Finding will remove such uncertainties in the future.

3. Disclosure of Written Findings to Congress

The Committees recommend legislation requiring that copies of all signed written Findings be sent to the Congressional Intelligence Committees.

Since existing law does not require that covert action Findings be in writing, there currently is no requirement that written Findings be disclosed to Congress. The existing practice has been not to provide the Intelligence Committees with a signed written Finding.

4. Findings: Agencies Covered

The Committees recommend that a Finding by the President should be required before a covert action is commenced by any department, agency, or entity of the United States Government regardless of what source of funds is used.

The existing statutes require a Presidential Finding before a covert action is conducted only if the covert action uses appropriated funds and is conducted by the Central Intelligence Agency (CIA). By executive order and National Security Decision Directive (NSDD), Presidential Findings are required before covert actions may be conducted by any agency. Nonetheless, both the National Security Council (NSC) and the Drug Enforcement Administration (DEA) became engaged in covert actions without Presidential Findings fully authorizing their involvement.

The executive order requirement is sound. In the Committees' judgment, Presidential Findings for covert actions conducted by any agency should be required by law. Experience suggests that Presidential accountability, as mandated by the Finding requirement, is equally as important in the case of covert actions conducted by agencies other than the CIA.

The Committees also believe the Finding requirement should apply regardless of the source of funding for the covert action.

5. Findings: Identifying Participants

The Committees recommend legislation requiring that each Finding should specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any way in any covert action and whether any third party, including any foreign country, will be used in carrying out or providing funds for the covert action. The Congress should be informed of the identities of such third parties in an appropriate fashion.

Current law does not require a Finding to state what agencies, third parties, or countries will be utilized in conducting a covert action. The Iran-Contra investigation demonstrates that disclosure of what U.S. agencies (such as the NSC), private parties, or foreign countries will be engaged in covert actions are matters of considerable importance if Congress is to fulfill its oversight responsibilities adequately.

The record of the Iran-Contra investigation reflects repeated efforts by the executive branch to obtain funds from third countries for covert operations and for other causes the Administration supports.

These actions raise concerns of two kinds. First, there is a risk that foreign countries will expect something in return. Second, in an extreme case such as that presented by the record of these hearings, the use of third country or private funds threatens to circumvent Congress' exclusive power of the purse.

6. Findings: The Attorney General

The Committees recommend that the Attorney General be provided with a copy of all proposed Findings for purposes of legal review.

The first Iranian arms Finding of December 5, 1985, was not reviewed by the Attorney General. The Attorney General did give oral advice on the January 17 Finding but did not do the analysis or research that a written opinion would have entailed. The President, the intelligence community, and Congress are entitled to a review by the country's chief legal officer to ensure that planned covert operations are lawful.

7. Findings: Presidential Reporting

The Committees recommend that consistent with the concepts of accountability inherent in the Finding process, the obligtion to report covert action Findings should be placed on the President.

Under current law, it is the head of the intelligence entity involved which has the obligation to report to Congress on covert action. Yet policy choices are inherently part of the Findings process and it is the President who must authorize covert operations through the signing of Findings.

8. Recertification of Findings

The Committees recommend that each Finding shall cease to be operative after one year unless the President certifies that the Finding is still in the national interest. The executive branch and the Intelligence Committees should conduct frequent periodic reviews of all covert operations.

9. Covert Actions Carried Out by Other Countries

The Committees believe that the definition of covert action should be changed so that it includes a request by an agency of the United Sttes to a foreign country or a private citizen to conduct a covert action on behalf of the United States.

10. Reporting Covert Arms Transfers

The Committees recommend that the law regulating the reporting of covert arms transfers be changed to require notice to Congress on any covert shipment of arms where the transfer is valued at more than $1 million.

Under current law, the Administration must report covert arms transfers involving any single item valued at more than $1 million. Since a TOW or a HAWK missile is individually worth less than $1 million, this reporting requirement did not apply to the Iranian arms sales even though two shipments involved $10 million in arms or more. It is the value of a transfer, not the value of each component of a transfer, that matters.

11. NSC Operational Activities

The Committees recommend that the members and staff of the NSC not engage in covert actions.

By statute the NSC was created to provide advice to the President on national security matters. But there is no express statutory prohibition on the NSC engaging in operational intelligence activities.

12. NSC Reporting to Congress

The Committees recommend legislation requiring that the President report to Congress periodically on the organization, size, function, and procedures of the NSC staff.

Such a report should include a list of duties for each NSC staff position from the National Security Adviser on down, and whether incumbents have been detailed from a particular department or agency. It should include a description of the President's guidelines and other instructions to the NSC, the National Security Adviser, and NSC staff for their activities. Particular attention should be paid to the number and tenure of uniformed military personnel assigned to the NSC.

13. Privatization

The Committees recommend a strict accounting of all U.S. Government funds managed by private citizens during the course of a covert action.

The record of the Iran-Contra hearings reflects use of private parties to conduct diplomatic missions and covert actions. Private parties can be of considerable use to the Government in both types of ventures and their use should be permitted. However, the record reflects that funds generated during a covert action are subject to abuse in the hands of a private citizen involved in conducting a covert action.

14. Preservation of Presidential Documents

The Committees recommend that the Presidential Records Act be reviewed to determine how it can be made more effective. Possible improvements include the establishment of a system of consultation with the Archivist of the United States to ensure complete compliance with the Act, the creation of a program of education of affected staff as to the Act's provisions, and the attachment of criminal penalties for violations of the Act.

During the Iran-Contra hearings, Oliver North, John Poindexter, Fawn Hall, and others admitted to having altered and destroyed key documents relating to their activities. Such actions constitute violations of the Presidential Records Act, which was intended to ensure the preservation of documents of historical value that were generated by the Chief Executive and his immediate staff.

15. CIA Inspector General and General Counsel

The Committees recommend that a system be developed so that the CIA has an independent statutory Inspector General confirmed by the Senate, like the Inspectors General of other agencies, and that the General Counsel of the CIA be confirmed by the Senate.

The CIA's internal investigation of the Iran-Contra Affair—conducted by the Office of the Inspector General—paralleled those of the Intelligence Committees and then the Iran Committees. It contributed to, and cooperated with, the Tower Board. Yet, the Office of the Inspector General appears not to have had the manpower, resources or tenacity to acquire key facts uncovered by the other investigations.

The Committees also believe the General Counsel plays an important role in these matters and accordingly should be confirmed by the Senate.

16. Foreign Bank Records Treaties

The Committees recommend that treaties be negotiated with foreign countries whose banks are used to conceal financial transactions by U.S. citizens, and that these treaties covering foreign bank records specify that Congress, not just the Department of Justice, has the right to request, to receive, and to utilize such records.

Many of the important records relating to the Iran-Contra Affair were generated by foreign banks that were used by the Enterprise for the covert arms sales to Iran and the Contra supply operation. The Independent Counsel has sought access to these Swiss bank records pursuant to a treaty with Switzerland. But the Independent Counsel and the Justice Department do not believe the Congressional Committees are entitled under the terms of the treaty to receive these records. New treaties should assure Congress of access to such records and should streamline the process for obtaining them. The Independent Counsel had not received all of the Swiss bank records after 9 months of waiting. Given the use of foreign banks by drug dealers, terrorists, and others involved in unlaw-

ful activity, it is more essential than ever that binding secrecy not be a shield for serious criminal conduct.

17. National Security Council

The Committees recommend that all statutory members of the National Security Council should be informed of Findings.

18. Findings Cannot Supercede Law

The Committees recommend legislation affirming what the Committees believe to be the existing law: that a Finding cannot be used by the President or any member of the executive branch to authorize an action inconsistent with, or contrary to, any statute of the United States.

19. Improving Consistency in Dealing with Security Breaches

The Committees recommend that consistent methods of dealing with leaks of classified information by government officials be developed.

The record of these hearings is replete with expressions of concern by executive branch officials over the problem of unauthorized handling and disclosure of classified information. The record is also replete with evidence that high NSC officials breached security regulations and disclosed classified documents to unauthorized persons when it suited their purposes. Yet no steps have been taken to withdraw or even review clearances of such people.

20. Review of Congressional Contempt Statutes

The Committees recommend that the Congressional contempt statutes be reviewed by the appropriate Committees.

There is a need, in Congressional investigations, for a swift and sure method of compelling compliance with Congressional orders for production of documents and the obtaining of testimony. These investigations raised questions about the adequacy of existing statutes.

In addition, new legislation should make clear that a Congressional deposition, including one conducted by staff, is a "proceeding" at which testimony may be compelled under the immunity statute, 18 U.S.C. Section 6001 *et. seq.*

21. Review of Special Compartmented Operations Within the Department of Defense

The Committees recommend that oversight by Intelligence and Armed Services Committees of Congress of special compartmented operations within the Department of Defense be strengthened to include systematic and comprehensive review of all such programs.

22. Review of Weapons Transfers by Chairman of Joint Chiefs of Staff

The Committees recommend that the President issue an order requiring that the Chairman of the Joint Chiefs of Staff should be consulted prior to any transfer of arms by the United States for purposes of presenting his views as to the potential impact on the military balance and on the readiness of United States forces.

23. National Security Adviser

The Committees recommend that Presidents adopt as a matter of policy the principle that the National Security Adviser to the President of the United States should not be an active military officer and that there should be a limit placed on the tour of military officers assigned to the staff of the National Security Council.

24. Intelligence Oversight Board

The Committees recommend that the Intelligence Oversight Board be revitalized and strengthened.

25. Review of Other Laws

The Committees suggest that appropriate standing Committees review certain laws for possible changes:

a. Should restrictions on sales of arms to certain countries under the Arms Export Control Act ("AECA") and other statutes governing overt sales be made applicable to covert sales?

b. Should the Hostage Act be repealed or amended?

c. Should enforcement or monitoring provisions be added to the AECA so that we better control retransfers of U.S.-manufactured arms by countries to whom we sell them?

26. Recommendations for Congress

a. The Committees recommend that the oversight capabilities of the Intelligence Committees be strengthened by acquisition of an audit staff.

b. The Committees recommend that the appropriate oversight committees conduct review of sole-source contracts for potential abuse.

c. The Committees recommend that uniform procedures be developed to ensure that classified information is handled in a secure manner and that such procedures should include clear and strengthened sanctions for unauthorized disclosure of national security secrets or classified information which shall be strictly enforced.

27. Joint Intelligence Committee

The Committees recommend against consolidating the separate House and Senate Intelligence Committees into a single joint committee. We believe that such consolidation would inevitably erode Congress' ability to perform its oversight function in connection with intelligence activities and covert operations. Congress has structured its system for effective oversight in this area to meet the need for secrecy that necessarily accompanies intelligence activities and the creation of a single oversight committee would simply add nothing to this effort.

Chapter 14
Recommendations

The majority report reaches the conclusion, accurately in our opinion, that the underlying cause of the Iran-Contra Affair had to do with people rather than with laws.* Despite this laudable premise, the majority goes on to offer no fewer than 27 recommendations, most involving legislation and several of them multifaceted. Some of the recommendations unfortunately betray Congress' role in the legislative-executive branch struggle by proposing needlessly detailed rules for the organization of the executive branch. At the same time, the majority recommendations barely touch the problem of leaks, and say nothing at all, to no one's surprise, about Congress' misuse of massive continuing appropriations resolutions to conduct foreign policy.

We do not intend here to give a detailed critique of the majority recommendations. We do believe that requiring the President to notify Congress of all covert operations within 48 hours, without any exceptions, would be both unconstitutional and unwise.** Many of the remaining recommendations seem to us to be unconscionably meddlesome. No good reasons are offered for prohibiting military officers, such as General Powell, from being National Security Adviser. No good reasons are offered for having the National Security Council produce regular staff rosters for Congress. And so forth, and so on. It all strikes as more of the same: an attempt to achieve grand policy results by picking away at the details.

In the spirit of offering recommendations, however, we are pleased to present some of our own.

Recommendation 1: Joint Intelligence Committee

Congress should replace its Senate and House Select Committees on Intelligence with a joint committee.

Congress has realized that limiting the number of people with access to sensitive information can help protect the information's security. The House and Senate took worthwhile first steps to limit the number of Members and staff engaged in intelligence oversight by establishing Select Committees on Intelligence. Unfortunately, as we have seen, security still is not tight enough. The time has now come, therefore, for taking the next logical steps.

Given the national security stakes involved, Congress and the Administration must find a remedy for restoring mutual trust. One major step in that direction can be taken by merging the existing House and Senate intelligence committees into a joint committee, along the lines of legislation (H.J. Res. 48) sponsored by Representative Henry Hyde and a bipartisan group of 135 cosponsors (see Appendix C). Such a committee need not have the 32 Members (plus four ex-officio) and 55 staff now needed for two separate committees. Fewer Members, supported by a small staff of apolitical professionals, could make up the single committee. In recognition of political reality, the majority-party membership from each House would have a one vote edge.

A joint intelligence panel would drastically diminish the opportunities for partisan posturing and substantially reduce the number of individuals with access to classified and sensitive information. This would not only minimize the risk of damaging unauthorized disclosures but would also significantly increase the likelihood of identifying leak sources—something that rarely occurs now because so many people are in the "intelligence information loop." Furthermore, with the possibility of discovery so much greater, potential leakers would be strongly deterred from unauthorized disclosures.

To achieve both efficiency and secrecy in congressional consideration of intelligence matters, a Joint Intelligence Committee must have legislative as well as oversight jurisdiction. Otherwise, the two Houses would not give the Joint Committee the deference the two existing intelligence committees enjoy. Neither would the intelligence agencies have the budget-based incentives to cooperate with the Joint Committee as they have now with the two select committees. Inadequate jurisdiction might also prompt the various committees in each House with historical interests in intelligence to reassert themselves. That could trigger increased fractionalization of the congressional oversight process, with the concomitant proliferation within the Congress of access to sensitive intelligence information.

* See Chapter 8 in the Minority Report at 532-536.

** See the Minority Report, Chapter 4 at 477-478, and Chapter 9 at 543-545.

Recommendation 2: Oath and Strict Penalties for Congress.

To improve security, the Joint Intelligence Committee (or the present House and Senate committees) should adopt a secrecy oath with stiff penalties for its violation.

Creating a joint committee will not by itself guarantee the security of intelligence information. Also essential is committee self-discipline. Earlier, we pointed out how the reputations of the Senate and House Intelligence Committees have been sullied by leaks from Members or staff. As the importance of congressional oversight, and the reputation for leaking, both grow, foreign intelligence agencies are discouraged from unguarded cooperation with the United States. Change is therefore urgent both to stanch the flow of leaks and to symbolize to foreign countries that Congress is serious about preserving the confidentiality of secrets.

One significant change that would help further both goals would be to require an oath of secrecy for all Members and staff of the intelligence committees. Such an oath would not be an American novelty. As we have already noted, the Continental Congress' Committee on Secret Correspondence required all of its members and employees to pledge not to divulge, directly or indirectly, any information that required secrecy.

The proposed oath should read: "I do solemnly swear (or affirm) that I will not directly or indirectly disclose to any unauthorized person any information received in the course of my duties on the [Senate, House or Joint] Intelligence Committee except with the formal approval of the Committee or Congress."

The Committee Rules should be amended to compel permanent expulsion from the committee of any member or staff person who violates his or her oath. While proceedings remain pending, the accused would be denied access to classified information. The rules of the House and Senate should also be amended to provide that the Intelligence Committee would be authorized to refer cases involving the unauthorized disclosure of classified information to the Ethics Committees. The rules should make it clear that the Ethics Committees may recommend appropriate sanctions, up to and including expulsion from Congress.

This approach is well within the Constitution's expulsion power and the power of each House to set rules for its own proceedings. The power of each House of Congress to expel Members for misbehavior by two-thirds vote is virtually uncircumscribed.[1] Historically, fifteen Senators and four Representatives have been expelled. Fourteen of the Senators were expelled for supporting the Confederate secession. The fifteenth, Senator Blount, was for conspiring with Indian tribes to attack Spanish Florida and Louisiana. The House and Senate also have considered and refused expulsion on twenty-four occasions for charges as varied as corruption, disloyalty, Mormonism, treasonable utterances, dueling, and attacking other Members of Congress. Expulsion decisions of Congress are probably beyond judicial review.[2]

Any set of recommendations that limits itself to Congress would not be adequate to respond to the problem of leaks. Therefore, we recommend a more balanced approach that would stiffen the penalties for others who participate in this activity.

Recommendation 3: Strengthening Sanctions

Sanctions against disclosing national security secrets or classified information should be strengthened.

Current federal law contains many provisions prohibiting the disclosure of classified information, but each of the existing provisions has loopholes or other difficulties that make them hard to apply. The section that covers the broadest spectrum of information, "classified information," only prohibits knowing, unauthorized communication to a foreign agent or member of a specified Communist organization.[3]

Another set of provisions contains no such limit on the recipient of the information, but applies only to information related to the national defense.[4] For some specified information, unauthorized disclosure or transmission is criminal under any circumstances.[5] The transmission of other "information relating to the national defense" to an unauthorized person is also illegal if a person has reason to believe the information would be used to injure the United States or to benefit a foreign nation. The problem with these provisions is that they cover only "information relating to the national defense" rather than the full range of national security information whose secrecy the government has a legitimate reason to protect.[6]

A third set of provisions in current law is limited to nuclear weapons production.[7] A fourth is limited to information about ciphers or communications intelligence.[8] This is the law that the National Security Agency Director, General William E. Odom, believes should be applied more vigorously against both federal employees and the press.*

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* The following is quoted from Molly Moore, "Prosecution of Media for Leaks Urged," The Washington Post, Sept. 3, 1987, p. A4:

"I don't want to blame any particular area for leaking," said Odom, who added, "There's leaking from Congress . . . there's more leaking in the administration because it's bigger. I'm just stuck with the consequences of it.

Leaks have damaged the [communications intelligence] system more in the past three to four years than in a long, long time.". . . .

Odom said he has encouraged the administration to use an obscure law that prohibits disclosures of "communications intelligence." Odom said he has referred several cases involving news leaks to the Justice Department since 1985 but said the department has declined to prosecute any of them. The department said it has not prosecuted any so far. . . .

Finally, a fifth provision—also limited in the information it protects—makes illegal the disclosure of agents' identities. This law is also restricted to disclosures by someone who (a) has authorized access to the identity from classified information or (b) is engaged in a "pattern of activities intended to identify and expose covert agents" with reason to believe the publicity would impair the foreign intelligence activities of the United States.[9] The latter limitation means that the agent disclosure law does not cover most normal press disclosures, such as the ones we mentioned earlier about reports based on these committees' work, because they are not normally part of a pattern or practice of identifying covert agents.

In order to close these loopholes, Rep. Bill McCollum has introduced a bill (H.R. 3066) co-sponsored by all the other Republican members of the House Iran Committee. The bill is limited to current and past federal employees in any branch of government. For these people, the bill would make it a felony knowingly to disclose classified information or material (not just specific national defense information) to any unauthorized person, whatever the intent.

Another approach that would supplement the McCollum bill would be to introduce substantial civil penalties for the knowing disclosure of classified information to any unauthorized person. The penalties might range from administrative censure to a permanent ban on federal employment and a fine of $10,000. The advantage of giving the Justice Department the option of using a civil statute would be (a) that the standard for proof would be the preponderance of evidence rather than proof beyond a reasonable doubt and (b) the law could stipulate that contested violations should be heard in secret, without a jury. These procedures should not encounter constitutional difficulties in light of the Supreme Court's broad endorsement of controls on the disclosure of classified information in *Snepp* v. *U.S.*[10]

Recommendation 4: Gang of Four

Permit the President to notify the "Gang of Four" instead of the "Gang of Eight" in special circumstances.

Representative Broomfield has introduced a bill that, among other things, would permit the President on extremely sensitive matters to notify only the Speaker of the House, House Minority Leader, Senate Majority Leader and Senate Minority Leader. Under current law, limited notification means notification of these four plus the chairmen and ranking minority members of the two intelligence committees. On the principal that notifying fewer people is better in extremely sensistive situations, we would be inclined to support legislation along these lines that would ratify what has already come to be an informal occasional practice.

Recommendation 5: Restore Presidential Power to Withstand Foreign Policy by Continuing Resolution

Require Congress to divide continuing resolutions into separate appropriations bills and give the President an item veto for foreign policy limitation amendments on appropriations bills.

The way Congress made foreign policy through the Boland Amendment is all too normal a way of doing business. Congress uses end of the year continuing resolutions to force its way on large matters and small, presenting the President with a package that forces him to choose between closing down the Government or capitulating. Congress should give the President an opportunity to address the major differences between himself and the Congress cleanly, instead of combining them with unrelated subjects. To restore the Presidency to the position it held just a few Administrations ago, Congress should exercise the self-discipline to split continuing resolutions into separate appropriation bills and present each of them individually to the President for his signature or veto. Even better would be a line-item veto that would permit the President to force Congress to an override vote without jeopardizing funding for the whole government.

"Generally, when I'm with a group of journalists, I can usually see two or three people who fall in the category of those who probably could be successfully prosecuted." Odom told the reporters.

The following material, from the same press briefing, is from Norman Black, "Gen. Odom blames leaks for 'deadly' intelligence loss," Associated Press dispatch published in The Washington Times, Sept. 3, 1987, pp. 1, 12:

Asked to provide examples, Gen. Odom said he didn't want "to get specific right now and compound the things, but a number of sources have dried up in some areas which you are all familiar with, in the past year or two.

A number of years ago there was a case that had to do with a Damascus communication. . . . It was a leak. It attributed this thing to an intercept. And the source dried up immediately," Gen. Odom said.

Asked then about Libya, he replied, "Libya, sure. Just deadly losses."